Supreme Court, U.S.
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No. 92-1455

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,
Petitioner,

v.

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, and its Milwaukee Branch (NAACP), CELESTINE LINDSEY, DOROTHY LISTENBEE, JAMES MILNER, DIANE PRATT, MARVIN PRATT, SIMON WILLIAMS, BEVERLY WILLIAMS, and LOIS WOODS, individually and as representatives of a class of all similarly situated persons,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

Whether the McCarran-Ferguson Act precludes the application of the Fair Housing Act to companies writing homeowners insurance subject to regulation under state insurance laws.

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THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, and its Milwaukee Branch (NAACP), CELESTINE LINDSEY, DOROTHY LISTENBEE, JAMES MILNER, DIANE PRATT, MARVIN PRATT, SIMON WILLIAMS, BEVERLY WILLIAMS, and LOIS WOODS, individually and as representatives of a class of all similarly situated persons,
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INTEREST OF THE AMICUS CURIAE *

The National Association of Independent Insurers (the "Association") is the largest association of property and casualty insurers in the country. It represents over

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* Counsel for all parties have consented to the filing of this amicus brief. *Amicus* has filed those consents with the Clerk of this Court.

560 property and casualty insurers that write over one-quarter of the property insurance sold in the United States. The Association regularly represents the interests of its members in cases before the Court that vitally affect the insurance industry.

The central issue presented in this case—whether Congress intended by the Fair Housing Act to subject insurance companies writing homeowners insurance to potentially conflicting state and federal regulation—is a matter of substantial concern to the Association and its members. The Association strongly opposes the use of race in insurance classifications, apart from any consideration of the risk involved. The Association believes, however, that the Fair Housing Act is not the proper vehicle for addressing this reprehensible practice. In the McCarran-Ferguson Act, Congress left "the business of insurance," including the regulation of insurance risk selection, to the states.

Because the Seventh Circuit's decision threatens this allocation of authority between the federal government and the states, the Association's members are vitally interested in this case. The Association, therefore, submits this brief to offer the unique perspective of the insurance industry on the importance of granting the Petition.

STATEMENT

Respondents filed a class action complaint against Petitioner on July 27, 1990, alleging that Petitioner had discriminated on the basis of race in the sale of homeowners insurance, thereby violating, *inter alia*, the federal Fair Housing Act and the Wisconsin Insurance Code. Petitioner moved to dismiss the claims arising out of the Fair Housing Act and the state insurance law for failure to state a claim upon which relief could be granted. *See* Fed. R. Civ. P. 12(b)(6). The district court granted that motion on December 11, 1990, and thereafter or-

dered entry of a partial final judgment on those claims. *See* Fed. R. Civ. P. 54(b).

The Seventh Circuit reversed in part and affirmed in part. Although it agreed with the district court that the Wisconsin Insurance Code (unlike the Fair Housing Act) created no private right of action, it disagreed with the district court in regard to Respondents' Fair Housing Act claim. In an opinion by Judge Easterbrook, the court first held that the McCarran-Ferguson Act's "inverse preemption" of federal law in favor of state law did not apply here; even though the court held that the McCarran-Ferguson Act applied to the subsequently-enacted Fair Housing Act, the court concluded that the McCarran-Ferguson Act did not preclude application of the Fair Housing Act since the Fair Housing Act merely duplicated state insurance laws forbidding "unfair discrimination." Pet. App. 13a-14a. Second, the court held that the Fair Housing Act could be construed to regulate the writing of homeowners insurance. *Id.* at 23a.

REASONS FOR GRANTING THE WRIT

The Seventh Circuit's decision creates a triple conflict. In order to reach its conclusion that the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* (1988), applies to regulate the writing of homeowners insurance, the Seventh Circuit had to break ranks with two other courts of appeals' precedents, and overrule one of its own.

> *First*, to hold that the Fair Housing Act "applies to discriminatory denials of insurance, and discriminatory pricing, that effectively preclude ownership of housing because of the race of the applicant," Pet. App. 24a, the court of appeals had to depart from the Fourth Circuit's holding in *Mackey v. Nationwide Ins. Co.*, 724 F.2d 419, 424 (4th Cir. 1984), that the Fair Housing Act "was not intended to reach the hazard insurance industry."

Second, to hold that the McCarran-Ferguson Act applies to the Fair Housing Act, Pet. App. 12a-13a, the court's decision had to break from the Second Circuit's holding in *Spirt v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054, 1065 (2d Cir. 1982), *vacated on other grounds*, 463 U.S. 1223 (1983), that the McCarran-Ferguson Act does not preclude application of subsequently-enacted civil rights laws, *i.e.*, Congress "had no intention of declaring that subsequently enacted civil rights legislation would be inapplicable to any and all of the activities of an insurance company that can be classified as 'the business of insurance.' "

Third, to hold that the McCarran-Ferguson Act nonetheless does not preclude application of the Fair Housing Act in this case because the Fair Housing Act's "[d]uplication" of Wisconsin law "is not conflict," Pet. App. 13a, the Seventh Circuit was forced to overrule one of its own precedents, *Lowe v. AARCO-American, Inc.*, 536 F.2d 1160, 1161-62 (7th Cir. 1976) (per curiam), which held that a federal statute duplicative of the terms of state law does "invalidate, impair, or supersede" state law in violation of the McCarran-Ferguson Act. *See* Pet. App. 15a.

These conflicts did not go unacknowledged by the court of appeals; indeed, the court understood that its opinion "overrules *Lowe* to the extent that *Lowe* holds that the McCarran-Ferguson Act prevents the application of federal laws duplicating state rules, and . . . conflicts with both the second circuit's views in *Spirt* and the fourth circuit's holding in *Mackey*." Pet. App. 27a.

The triple conflict involving the interpretation of two important federal statutes, the Fair Housing Act and the McCarran-Ferguson Act, should be a compelling enough reason for this Court to grant review. But there are other compelling reasons as well. By applying the Fair Housing Act to the business of insurance, the Seventh Circuit up-

set the balance that the McCarran-Ferguson Act strikes between federal and state authority over the "business of insurance." Sound policy reasons, which we address below, further underscore the incorrectness of the Seventh Circuit's decision. For all of these reasons, certiorari should be granted.

A. THE SEVENTH CIRCUIT'S DECISION UNDERMINES THE AUTHORITY OF THE STATES TO REGULATE INSURANCE.

By holding that the Fair Housing Act may be applied to sellers of homeowners insurance, the Seventh Circuit has misconstrued the McCarran-Ferguson Act in a manner that threatens "the continued supremacy of the States," *SEC v. National Securities, Inc.*, 393 U.S. 453, 459 (1969), in regulating the business of insurance. If permitted to stand, the court of appeals' decision will have a tremendous impact on thousands of insurers previously subject only to state regulations. Only this Court can prevent this usurping of state authority in the insurance field.

1. Congress enacted the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* (1988), to further its determination "that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U.S.C. § 1011. *See also* S. Rep. No. 20, 79th Cong., 1st Sess. 2 (1945); H.R. Rep. No. 143, 79th Cong., 1st Sess. 2-3 (1945). Congress's primary goal, in the wake of this Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) (holding that insurance transactions were subject to federal regulation under the Commerce Clause), was to enact legislation "that would ensure that the States would continue to have the ability to tax and regulate the business of insurance."

Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 217-18 (1979). To ensure the states' primacy in this field, the McCarran-Ferguson Act provides:

> (a) State regulation.
>
> The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) Federal regulation.
>
> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance[.]

15 U.S.C. § 1012.

To determine whether a federal statute is inapplicable to conduct by virtue of the McCarran-Ferguson Act, courts have undertaken a four-part inquiry based on the statute. *First*, if the federal statute specifically relates to "the business of insurance," preclusion of the federal law is inappropriate. *See* 15 U.S.C. § 1012(b); *SEC v. National Securities, Inc.*, 393 U.S. at 459-61. *Second*, preclusion of the federal statute is also inappropriate unless the state has enacted law for the purpose of regulating insurance activities. *Id.* at 457-59; *FTC v. National Casualty Co.*, 357 U.S. 560, 563-65 (1958). *Third*, a federal statute can only be precluded if the activities underlying the cause of action are "the business of insurance" within the meaning of the Act. *SEC v. National Securities, Inc.*, 393 U.S. at 459-60; *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. at 210. And *fourth*, the federal statute will be precluded only if it would "invalidate, impair, or supersede" any state law regulating insurance. 15 U.S.C. § 1012(a); *see also SEC v. National Securities, Inc.*, 393 U.S. at 463. All four prongs must be satisfied

for the McCarran-Ferguson Act to preclude application of a federal statute.

2. The Seventh Circuit found the first three prongs satisfied, but not the fourth. It held (a) that the Fair Housing Act did not specifically relate to the business of insurance,' *see* Pet. App. 9a-10a; (b) that the State of Wisconsin has enacted laws to regulate insurance activities, *see id.* at 13a, 24a-26a; and (c) that the challenged activities of Petitioner were "the business of insurance." *See id* at 10a. The court concluded, however, that the Fair Housing Act did not "invalidate, impair or supersede" Wisconsin law because the Fair Housing Act was merely duplicative of Wisconsin law, and—in Judge Easterbrook's words—"[d]uplication is not conflict." Pet. App. 13a. This holding was in error.

The Seventh Circuit reached this erroneous conclusion by relying on analogy instead of relying on the words of the McCarran-Ferguson Act:

> The McCarran-Ferguson Act is a form of inverse preemption, so principles defining when state remedies conflict with (and so are preempted by) federal law are pertinent in deciding when federal rules "invalidate, impair, or supersede" state rules.

Pet. App. 14a. But principles of federal preemption are not so easily transferable to the language of the McCarran-Ferguson Act. Federal preemption of state legislation is based on the Supremacy Clause of Article VI of the Constitution, which simply provides that federal law "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The McCarran-Ferguson Act, in contrast, contains very different language: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . ."

The analogy fails because even where a federal statute *duplicates* a state's regulation of insurance, the mere availability of the alternative federal remedy "impairs" the state's ability to regulate "the business of insurance" through a uniform regulatory system. Moreover, having duplicative federal remedies allows plaintiffs to bring insurance-related cases in federal court by invoking federal-question jurisdiction, instead of bringing them in state court or before state regulators. In such a case, the federal statute effectively "supersedes" the state's authority to dictate where and how the business of insurance will be regulated. Thus, although "duplication" may not be "conflict" in a Supremacy Clause sense, the duplication certainly "impairs" and "supersedes" state law in violation of the McCarran-Ferguson Act.

3. The decision below, applying the Fair Housing Act to homeowners insurance regulated under Wisconsin law, effectuates precisely such an impairment. The McCarran-Ferguson Act recognizes that the business of insurance is "fundamentally local in character, and therefore best regulated by the States." H.R. Rep. No. 873, 78th Cong., 1st Sess. 9 (1943). In order to fulfill McCarran-Ferguson's mandate, the State of Wisconsin has enacted a comprehensive and integrated insurance code (two full volumes of the *Wisconsin Statutes Annotated*). Moreover, like every other state, *see* Robert E. Keeton & Alan I. Widiss, *Insurance Law* § 8.1(c), at 937 (Practitioner's ed. 1988), "Wisconsin maintains a substantial administrative apparatus regulating the conduct of insurers," Pet. App. 26a, which is administered by a Commissioner of Insurance. *See* Wis. Stat. Ann. §§ 601.11-601.73 (West 1980 & Supp. 1992). In enacting its insurance code, the Wisconsin Legislature sought to "create[] a simple and consistent framework for the enforcement of the insurance laws." Wis. Stat. Ann., ch. 601 Committee Comment (1969). Two of the stated purposes of the Wisconsin insurance code bear out Wisconsin's intent to regulate

comprehensively the business of insurance: to "provide for an office that is expert in the field of insurance," and to "improve and thereby preserve state regulation of insurance." Wis. Stat. Ann. § 601.01(d), (f) (West 1980 & Supp. 1992).

a. The court of appeals' decision plainly allows the Fair Housing Act to "impair" Wisconsin's insurance code. Wisconsin prohibits "unfair discrimination" in setting insurance rates, *see* Wis. Stat. Ann. § 625.11(1); Wis. Admin. Code § Ins 6.68 (April 1992), which is the practice that Respondents seek to challenge under the Fair Housing Act. Under Wisconsin's scheme, the Insurance Commissioner must be certain that insurance practices reflect an individual's contribution to the risk pool, and must resolve such questions as whether classifications based on location are equitable and, if not, what procedure should be prescribed to eliminate the improper classifications.

The Seventh Circuit recognized that Wisconsin's insurance code prohibits unfair discrimination in setting insurance rates, although it also held that the section allows for only administrative, and not judicial, enforcement. *See* Pet. App. 25a; *see also* Wis. Stat. Ann. §§ 625.11(4), 628.34(3)(a), (11), (12) (West 1980 & Supp. 1992). But the fact that "Wisconsin wants such contentions submitted to administrators rather than judges," Pet. App. 26a, completely undermines any serious argument for concurrent state and federal regulation—Wisconsin clearly wants these claims brought by its Commissioner of Insurance, who possesses the expertise and long-term vision that will help the insurance law "maintain its vitality and relevance." Wis. Stat. Ann. ch. 601 Committee Comment (1969). Allowing judicial enforcement of the Fair Housing Act in lieu of the state administrative procedures clearly "impairs" Wisconsin's preference to have "such contentions submitted to administrators rather than judges." Pet. App. 26a.

b. The Seventh Circuit's decision also allows the Fair Housing Act to "supersede" the Wisconsin insurance code. It takes the regulation of insurance away from the unitary guidance of the state insurance department and gives it, in part, to the piecemeal litigation process. Persons claiming "unfair discrimination" in the setting of insurance rates now may shop for the forum that suits them. They may even completely bypass state administrative processes—such as Wisconsin's—in favor of a judicial proceeding brought under the Fair Housing Act. The Seventh Circuit's decision thus replaces state insurance commissioners' unitary regulatory authority with the interstitial judicial decisionmaking process, a result at odds with the fundamental assumptions underlying the McCarran-Ferguson Act:

> All insurance policies are entered into in one State or another and that State in which they are entered into may through State regulation meet all problems presented. If regulation be undertaken by the Federal Government this must inevitably result in a general pattern which is not applicable in meeting the requirements of the different States as they should be met and as those States now meet them.

H.R. Rep. No. 873, 78th Cong., 1st Sess. 9 (1943).

In sum, the Seventh Circuit's decision allows the Fair Housing Act to interfere with the regulation of insurance, insurers' risk assessments, and rate-setting, matters long reserved for the authority of the several states. The Court should intervene to prevent these matters from being subjected to a patchwork of federal and state authority.

B. THE FAIR HOUSING ACT DOES NOT, BY ITS TERMS, APPLY TO INSURANCE.

Conceding that its decision conflicts with a decision of the Fourth Circuit, *Mackey v. Nationwide Ins. Co., supra,* the Seventh Circuit held that the Fair Housing Act "applies to discriminatory denials of insurance, and discrimi-

natory pricing, that effectively preclude ownership of housing because of the race of the applicant." Pet. App. 24a. Section 804 of that Act (42 U.S.C. § 3604) makes it unlawful:

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, *or otherwise make unavailable* or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, *or in the provision of services* or facilities *in connection therewith*, because of race, color, sex, familial status, or national origin.

(emphasis added). To reach the conclusion that the Fair Housing Act regulates insurance, the court of appeals relied on the italicized "catch-all" provision in § 3604(a) and the "services" language in §3604(b); concluded that these sections were ambiguous as applied to the business of insurance; and then allowed *Chevron* deference (*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)) to do the rest.

Petitioners have covered this legal issue in detail. *See* Pet. Cert. 12-18. Suffice it to say here that neither the language of the Fair Housing Act nor its legislative history makes any reference to homeowners insurance—the Act was not designed to reach "every discriminatory act that might conceivably affect the availability of housing." *Mackey v. Nationwide Ins. Co.*, 724 F.2d at 423. Rather, that Act was intended to eliminate the discriminatory practices of property owners, real estate brokers, builders, and home financiers. 114 Cong. Rec. 2272-84 (1968); *Mackey*, 724 F.2d at 423. The numerous, and unsuccessful, attempts to amend the Fair Housing Act to cover homeowners insurance provide further evidence that the Act, as it is presently written, does not regulate home-

owners insurance. *See, e.g.*, 126 Cong. Rec. 32991 (1980) (remarks of Sen. Heflin).

Applying the Fair Housing Act to the business of insurance poses not only significant legal problems, but important policy concerns as well. Although this Court "has yet to decide whether practices with disparate impact violate Title VIII," Pet. App. 3a (citing *Huntington v. NAACP*, 488 U.S. 15 (1988)), many courts of appeals have concluded that a violation of the Fair Housing may be proved merely by showing a discriminatory impact. *See, e.g., Halet v. Wend Investment Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982); *United States v. Mitchell*, 580 F.2d 789, 791 (5th Cir. 1978); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146-48 (3d Cir. 1977), *cert. denied sub nom. Whitman Area Improvement Council v. Resident Advisory Bd.*, 435 U.S. 908 (1978); *Metropolitan Housing Dev. Co. v. Village of Arlington Heights*, 558 F.2d 1283, 1289-90 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); *Smith v. Anchor Building Corp.*, 536 F.2d 231, 233 (8th Cir. 1976).[1] Thus, regulation of insurance practices under the Fair Housing Act would likely preclude otherwise-permissible allocations of risk. Individuals could no longer be classified as groups, regardless of the peculiar risks inherent in that group, if there would be a discriminatory effect.

Insurance, however, is necessarily based upon risk sharing. Insurance companies accept these risks because they can spread their actual losses "across the board," over the risks accepted. For risk sharing to be fair and equitable, then, insureds must be grouped with other individ-

[1] To be sure, since Respondents' complaint was dismissed pursuant to Fed. R. Civ. P. 12(b)(6), "we must assume that plaintiffs can establish that the defendant intentionally discriminates on account of race." Pet. App. 2a. However, the ultimate question presented in this case—whether the Fair Housing Act applies *at all* to the business of insurance—is a question *of law*, and is thus unaffected by this assumption of fact.

uals possessing similar risks. These groupings are not arbitrary; rather, they are based on the statistical correlation of certain variables that help the company predict the insured's risk of loss.

With homeowners insurance, for example, it may be statistically demonstrated that the location of a dwelling affects the potential for loss. The likelihood of natural disasters, theft or vandalism, as well as the quality of police and fire protection available in the area, all enter into that calculation. Just as rural isolation from police and fire departments can be a negative factor in rate-setting, location in the center of a densely-populated city is also undesirable, because of the increased possibility of manmade calamities. Regina Austin, *The Insurance Classification Controversy*, 131 U. Pa. L. Rev. 517, 542-45 (1983).

Such classifications must have a meaningful actuarial basis, *i.e.*, the classification must group together all of those individuals who have a similar risk of loss. Where there is proper classification, however, the result is what in insurance parlance is called "fair discrimination." "Fair discrimination" does not involve considerations of race or any other impermissible classification; rather, it refers only to classifications based on actuarially-verifiable risks, a proper and necessary step in developing fair insurance rates. Each insured thus pays an appropriate price for the risk that he or she brings to the pool, and anything that departs from that is unfair discrimination. "In fact, the failure to grant a preference in rates reflecting the expense differential results in unfair discrimination." *The Pricing and Marketing of Insurance: A Report of the United States Department of Justice to the Task Group on Antitrust Immunities* 308-09 (1977).

The result of prohibiting such group classifications would be an inequitable distribution of insurance risks and a potential financial peril to many insurers. In effect, low-

risk homeowners would unfairly subsidize high-risk homeowners. In turn, the low-risk individuals would be encouraged to drop out of the risk pool altogether, instead of paying a subsidy for the high-risk members of the pool. Homeowners with safer homes would conclude that the cost of "self-insurance" would be less than the cost of purchasing coverage. Rates formerly set on a risk pool containing safe and less-safe homes, if applied to the remaining, primarily less-safe homes, would be insufficient to cover the accident losses of the insureds. Accordingly, even higher rates would be set, and some companies may drop out of the market altogether. The perverse result that the Seventh Circuit's decision engenders is that application of the Fair Housing Act could make homeowners insurance *less* available.

Finally, one other consideration bears note. The setting of insurance rates is a complex, multi-variable task that is traditionally left to specialized state agencies to regulate. In view of the complexity of the task, and the traditional role of the states in regulating insurance, it is extremely unlikely that Congress, by two "catch-all" phrases in the Fair Housing Act, intended to include the business of insurance within the scope of that Act. The Seventh Circuit properly recognized that the Fair Housing Act and its legislative history were silent on its application to insurance. Pet. App. 20a-21a. But this "silence on the part of the Congress," 15 U.S.C. § 1011, should have made the court of appeals

> reluctan[t] to disturb the state regulatory schemes that are in actual effect, either by displacing them or by superimposing federal requirements on transactions that are tailored to meet state requirements. When the States speak in the field of "insurance," they speak with the authority of a long tradition.

SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65, 68 (1959).

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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